

Award No. 1444

Docket No. 1356

2-IC-CM-'51

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Carmen)**

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1—That under the current agreement the Carrier improperly assigned Car Inspectors R. J. Bise, P. E. Bell, C. L. Breeze, J. A. Hiatt and C. E. Stover to a work week Wednesday through Sunday, with Monday and Tuesday as rest days, effective January 18, 1950.

2—That accordingly the Carrier be ordered to:

- a) Assign these employes to a proper work week of five (5) days, Monday through Friday with rest days Saturday and Sunday.
- b) Make these Claimants whole by additionally compensating each of them at the applicable overtime rates instead of only straight time for the services which they were assigned to perform on each Saturday and each Sunday, retroactive to January 21, 1950.
- c) Make these Claimants whole by additionally compensating each of them in the amount of eight (8) hours at the applicable rates of pay for each Monday and each Tuesday that they were not permitted to work, retroactive to January 21, 1950.

EMPLOYEES' STATEMENT OF FACTS: At Bluford, Illinois, prior to January 21, 1950, the carrier maintained three (3) shifts of car inspectors in the train yard, seven (7) days per week. These carmen, their assignments of hours and rest days follow:

First Shift—7:00 A. M. to 3:00 P. M.

- 1—Z. L. Watts—Monday through Friday with rest days Saturday and Sunday.
- 2—J. Donoho—Tuesday through Saturday with rest days Sunday and Monday.
- 3—L. Burrows—Saturday through Wednesday with rest days Thursday and Friday.

gered workweek', 'in accordance with operational requirements', and 'so far as practical'. The great variety of conditions met in the railroad system of the country and even varied conditions on a single railroad require flexibility on this matter. The tenor and substance of the Board's discussions and recommendation show definitely that the Board intended to permit the Carriers to stagger workweeks. In contrast with the obligation of the Carriers to sustain the burden of proof in the matter of non-consecutive rest days, it is for the employees here to show that some particular operational requirements of the Carrier are not better met by having the workweeks staggered."

Rule 1 (B) (d) must also be read in relation to Rules 1 (B) (i) and (j) captioned "Beginning of Work Week" and "Sunday Work". The "work week" for the claimants is five consecutive days beginning on Wednesday, and the Sunday rule stated that "The intent is to recognize that the number of people on necessary Sunday work may change." The traffic conditions or operational requirements necessitated increasing carmen in yards in January, 1950, and, conversely, when and if such traffic decreases, the forces will have to be adjusted in the same manner to harmonize with the actual operational requirements. This is likewise in conformity with the Interstate Commerce Act as amended by the Transportation Act of 1940 wherein:

"It is hereby declared to be the national transportation policy of the Congress . . . to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation . . .", and

Section 15a (2) of the Act prescribes in part:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration . . . to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management to provide such service.", and

In the annual report of the I.C.C. for 1948 the Commission said: ". . . the railroads should do 'much more' in the fields of increased efficiency and reduction of operating costs. The Commission further said it was aware of 'the many efforts which the railroads individually and to some extent collectively are making to increase the efficiency of particular operations', but it added 'Opportunities of this kind extend from the multitude of minor day to day operations to large scale change in practices which require both careful planning and substantial capital investments. A thorough searching out of better ways of doing these lesser things which constitute a railroad's day's work must be undertaken. Bold experimentation with new devices and methods seems to be required in some instances.'"

This claim is not supported by the rules of the agreement, nor is the action of the carrier a violation thereof, and we respectfully request that the claim be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Dockets 1333 and 1356 will be discussed together, because they are both controlled by the same construction of the 40-hour week agreement. In Docket 1333, the claimants were furloughed men. They were recalled under the provisions of Rule 28 for the purpose of making immediately required repairs to a crane. They were called for a period of four days, Saturday to and including Tuesday. The operation to which they were attached was a running repair shop—a seven day per week continuous operation. In Docket 1356, the claimants were the occupants of newly established positions of car inspectors, which positions were established to work five days per week, Wednesday through Sunday inclusive. At the train yard where these positions were established, there were already thirteen positions of car inspectors in continuous operation seven days per week. Because of the five-day assignment of the occupants it was necessary to have eighteen men to supply the full quota of work. When the five new positions were established, Monday and Tuesday were blanked and accordingly no relief was required, the five assignees of positions performing all the work. The seven-day positions and the five-day positions at this operation were distinctly identified.

The claim in each case is for punitive time based on Rule 1 (B) (b).
“Five-day Positions—

On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.”

That rule is clear and definite and nowhere is an exception to be found to it. Paragraphs (c) and (d) govern six-day positions and seven-day positions. Note (B) relied on by the carrier as creating a basis for an exception to Rule (b) does not do so. Provision is made in the agreement for staggering assignments covered by the six and seven-day positions. There is nothing in the rule that permits staggering five-day positions and there could be no reason for such inasmuch as the assignments being for five days there is no occasion for any relief on such positions. The agreement fully recognizes as did the Emergency Board which recommended it, that certain operations of the carrier must be continuous, operated seven days per week. This concept is not a novelty born of the 40-hour week agreement. Long before that agreement there were many agreements, particularly of other crafts, which while in general providing for punitive pay for Sunday work made an exception as to continuous service positions. Such positions operating seven days per week were commonly filled by six-day assignments, relief being afforded one day a week by other relief positions. When such relief for one day in seven was afforded the occupant of the position, he could be required to work Sunday at straight time. Where there were a number of employes at a single operation, facility or location, the rest day would be bulletined and seniority would control the choice of that day. To qualify as such continuous operation positions, they must be worked every day of the week (not by one employe however). The position could not be blanked on any day when service was not needed without taking it out of the continuous operation category and subjecting it to punitive time for Sunday. All the 40-hour week agreement purported to do was to make provision to apply the same principles insofar as seven-day positions were concerned, to permit of their being operated by five-day assignments and make a similar provision to be applicable to six-day positions. To do this, it was likewise necessary to provide for staggered work-weeks with varying rest days. The inclusion of the words:

“Note (B) * * * or operations necessary to be performed
the specified number of days per week * * *,”

has given rise to the theory of defense in these cases, namely, that if the operation, or facility, where the work may be located has any seven or

six-day positions, that then the staggering and different rest days can be applied to all of the positions at the operation or facility. To place such a construction on that language would mean that, although there might be distinctive five-day, six-day, and seven-day positions at the facility, the five-day positions would not be regarded as such, but would be subject to the same staggering and different rest days as would the six and seven-day positions at that facility. In other words, the contention in effect is that although there are indisputable five-day positions at the facility, Rule (b) has no application to them. As a matter of plain construction, to warrant any such result, it would be necessary that Rule (b) carry an exception within itself, based on subsequent provisions supposed to modify it. Nowhere in the agreement, as a whole, or in the Emergency Board's Report, is anything found to warrant an inference that there was any exception to be made to the absolute requirement that Saturdays and Sundays must be the rest days of five-day positions.

So far as the car inspection positions are concerned, the carrier has the right to utilize these inspectors at car repair work when not needed on inspection work, and they could have met the difficulty, and avoided punitive time, by making seven-day position bulletined as inspectors, with a note that they would be used on repairs when not needed for inspection. Apparently, that is what the carrier has now done as it no longer blanks the position for two days. As to the crane repair men, it is plain they were not engaged on any continuous operation, or even six-day position. They were simply recalled for the minimum number of days they could be under Rule 28.

From the foregoing, it follows, that in both cases, the claimants are entitled to punitive time for their work on Saturday and Sunday.

In this case, Docket 1356, beside the claim for punitive time on the rest days there are two additional prayers—(a) that the claimants be assigned to a proper work week of five days and—(c) that they be paid for Monday and Tuesday not worked. These two prayers will be denied. Claim "b" sustained.

AWARD

Claim "b" sustained.

Claims "a" and "c" denied.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of March, 1951.

DISSENT OF THE CARRIER MEMBERS TO AWARD NO. 1444,

DOCKET NO. 1356.

As in Docket No. 1333, so do the findings and award of the majority in Docket No. 1356 represent error predicated upon fallacious assumption. Not only do the majority ignore the spirit and intent of the recommendations of Emergency Board No. 66 and of the resultant 40-hour week agreement: in addition, they distort and violate the specific provisions of the applicable rules of the current schedule agreement involved and seek solution of a problem through application thereto of schedule rules not involved therein.

The sole legal function of this Board is that of interpretation of the provisions of schedule rules. That sole function of interpretation properly cannot be enlarged to include revision, amendment, addition or deletion, as is the case in the present instance.

The majority find that "In Docket 1356, the claimants were the occupants of newly established positions of car inspectors, which positions were established to work five days per week, Wednesday through Sunday inclusive. At the train yard where these positions were established, there were already thirteen positions of car inspectors in continuous operation seven days per week. Because of the five-day assignment of the occupants it was necessary to have eighteen men to supply the full quota of work. When the five new positions were established, Monday and Tuesday were blanked and accordingly no relief was required, the five assignees of positions performing all the work. The seven-day positions and the five-day positions at this operation were distinctly identified."

Here the majority commit their first error. The fundamental flaw here involved is the majority's attempt to consider individual positions. Rule 1 (B) of the applicable schedule agreement reads:

"(B) Note. The expressions 'positions' and 'work' used in this schedule of rules refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employes."

The majority's attempted consideration of individual positions definitely violates the provisions of Rule 1 (B).

Similar treatment is accorded Rule 1 (B) (a), which reads:

"(a) Subject to the exceptions contained in this schedule of rules, a work week of 40 hours shall consist of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the following provisions:"

The majority findings contain references to the report of Emergency Board No. 66. The applicable schedule agreement here is controlling but, in view of the precedent set by the majority, further reference to the report of Emergency Board No. 66 may not be amiss as shedding light upon Rule 1 (B) (a) quoted above. At page 18 of its report, Emergency Board No. 66 states:

"* * * It is perfectly clear that it is completely unrealistic to suggest that the railroads operate only Mondays through Fridays. Work must be done on every day of the year, and the imposition of penalty rates on certain days will not alter this fact. Similar situations have been faced in other continuous process industries and the general practice is to provide in such instances that Saturdays and Sundays be treated as ordinary working days for pay purposes and to permit management to schedule work assignments on a staggered 5-day workweek basis. Frequently, the staggered week is accompanied by a rotating of weekly work schedules in order to distribute the desirable days off as equally as possible. Work beyond 5 days or over 40 hours in any week is paid for at time and a half. These practices should be adopted by this industry as well, because apparently they are workable and desirable. Consistent with their operational requirements, the Carriers should allow the employes two consecutive days off in seven and so far as practicable these days should be Saturdays and Sundays."

Furthermore, under date of February 27, 1949 the former members of Emergency Board No. 66, who had been recalled by the parties to clarify certain portions of the Board's report, addressed a letter jointly to the Carriers' Conference Committees and to the Sixteen Cooperating Railway Labor Organizations, stating, in part:

"A workweek of 40 hours, consisting of 5 days of 8 hours each, with 2 consecutive days off in 7 was recommended. This represents the major difference between the parties, because on page 18 of the report, following a description of the continuous nature of railroad operations and of the methods used in other industries, the Board said:

'Consistent with their operational requirements, the Carriers should allow the employes two consecutive days off in seven and so far as practicable these days should be Saturdays and Sundays.'

This sentence if read and compared with other expressions in the report has a plain meaning. 'Consistent with their operational requirements' qualifies the entire 40 hour program recommended. That program has a combination of elements: five 8-hour days, 40 hours per week, two consecutive days off each week, Saturdays and Sundays as the rest days, staggered workweeks and relief assignments.

* * *

The next question relates to the staggering of the workweek and Saturdays and Sundays as the days of rest. Obviously, if the workweek is staggered some employes cannot have these specific days off. That the Board expected deviations from this pattern is made abundantly clear by its repeated use of the expressions 'staggered workweek', 'in accordance with operational requirements', and 'so far as practical'. The great variety of conditions met in the railroad system of the country and even varied conditions on a single railroad require flexibility on this matter. The tenor and substance of the Board's discussions and recommendation show definitely that the Board intended to permit the Carriers to stagger workweeks. In contrast with the obligation of the Carriers to sustain the burden of proof in the matter of non-consecutive rest days, it is for the employes here to show that some particular operational requirements of the Carrier are not better met by having the workweeks staggered."

The majority further find that "The claim * * * is for punitive time based on Rule 1 (B) (b).

'Five-day Positions—

On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.'

That rule is clear and definite and nowhere is an exception to be found to it."

Rule 1 (B) (b), of course, is subject to the provisions of Rule 1 (B). Furthermore, the fact remains that Rule 1 (B) (b) has no relation whatsoever to the matter before us. The majority here again attempt to deal with positions and the work week of individual employes and not with the controlling requirement of service, duties, or operations necessary to be performed the specified number of days per week.

The majority also find that "The inclusion of the words:

'Note (B). * * * or operations necessary to be performed the specified number of days per week * * *,'

has given rise to the theory of defense in these cases, namely, that if the operation, or facility, where the work may be located has any seven or six-day positions, that then the staggering and different rest days can be applied to all of the positions at the operation or facility."

The majority further find that "At the train yard where these positions were established, there were already thirteen positions of car inspectors in continuous operation seven days per week." The majority thus recognize that the service, duties and operations of car inspectors at this particular point were "necessary to be performed" seven days per week. Claimants filled positions in the same service, duties, and operations. But once having ventured this far into the field of fact, the majority quickly retreat again into a discussion of positions and the work week of individual employes still completely ignoring the provisions of Rule 1 (B).

Let us return once more to the controlling rules of the applicable schedule agreement, with particular reference to the facts in this case.

Rule 1 (B), previously quoted, reads:

"(B) Note. The expressions 'positions' and 'work' used in this schedule of rules refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employes."

Rule 1 (B) (a), previously quoted, reads:

"(a) Subject to the exceptions contained in this schedule of rules, a work week of 40 hours shall consist of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the following provisions:"

Rule 1 (B) (d) reads:

"(d) Seven-day Positions—

On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

Combining Rule 1 (B), Rule 1 (B) (a) and Rule 1 (B) (d), we have the following provisions applicable to the instant case.

On service, duties, or operations necessary to be performed seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday. The work weeks may be staggered in accordance with the carrier's operational requirements.

The assignment of the claimants meets all of the foregoing provisions.

Finally, the majority reminisce about the old "continuous operation" rule and find that "The agreement fully recognizes as did the Emergency Board which recommended it, that certain operations of the carrier must be continuous, operated seven days per week. This concept is not a novelty born of the 40-hour week agreement. Long before that agreement there were many agreements, particularly of other crafts, which while in general providing for punitive pay for Sunday work made an exception as to con-

tinuous service positions. Such positions operating seven days per week were commonly filled by six-day assignments, relief being afforded one day a week by other relief positions. When such relief for one day in seven was afforded the occupant of the position, he could be required to work Sunday at straight time. Where there were a number of employes at a single operation, facility or location, the rest day would be bulletined and seniority would control the choice of that day. To qualify as such continuous operation positions, they must be worked every day of the week (not by one employe however). The position could not be blanked on any day without taking it out of the continuous operation category and subjecting it to punitive time for Sunday. All the 40-hour week agreement purported to do was to make provision to apply the same principles insofar as seven-day positions were concerned, to permit of their being operated by five-day assignments and make a similar provision to be applicable to six-day positions."

Here, indeed, is fallacy placed above fact. This is a most amazing finding, claiming, it seems, that between the 40-hour week provisions and the old "continuous operation" rule there is only distinction and not difference. There are both distinction and difference, and they are great. This attempt to draw a parallel between the "continuous operation" rule, now out of the picture, and the 40-hour week agreement, is the major error made by the majority, leading, inevitably, to the second error that claimants occupied five-day "positions" in a seven-day facility.

In broad variance from the old "continuous operation" rule which went to individual positions, the 40-hour week agreement goes to "service, duties, or operations" and "not to the work week of individual employes". (Rule 1 (B).) Further, under the 40-hour week, "the work weeks may be staggered in accordance with the carrier's operational requirements". (Rule 1 (B) (a).) These differences are so great that any attempt to rationalize the proper application of the 40-hour week agreement from the old "continuous operation" rule can only compound error.

The majority further find, however, that "To do this, it was likewise necessary to provide for staggered work-weeks with varying rest days." Here is truth, in part, but not complete. What kind of staggered work weeks? Rule 1 (B) (a) provides the full answer—work weeks "staggered in accordance with the carrier's operational requirements".

Thus the majority find that in seven-day service, duties, or operations, work weeks may be staggered. From their award, however, they appear to find that such staggering of work weeks is proper only when the same number of employes are worked on each of the seven days of the week. Thus if 35 man-days were required weekly in seven-day service, duties, or operations, at a particular facility they, apparently, feel that the work weeks must be so staggered that five men will work each day of the week. There is no such requirement in the 40-hour week agreement or in the schedule agreement here applicable.

As constantly reiterated, Rule 1 (B) (a) provides that "the work weeks may be staggered in accordance with the carrier's operational requirements". In some seven-day facilities a carrier's operational requirements may be uniform throughout the week. In other seven-day facilities, operational requirements may vary greatly from day to day, and it is in such instances that staggered work weeks principally are found. A carrier again may require 35 man-days weekly in seven-day service, duties, or operations at a particular facility, but its operational requirements may call for 3 men on Monday, 4 men on Tuesday, 5 men on Wednesday, 7 men on Thursday and Friday, 6 men on Saturday and 3 men on Sunday. These are work weeks "staggered in accordance with the carrier's operational requirements" and comply fully with the provisions of the 40-hour week agreement. Similarly, the assignments in the present issue comply fully with the requirements of the applicable schedule agreement.

Under the meaning and intent of the report of Emergency Board No. 66 and under the specific provisions of the applicable schedule agreement claimants were properly assigned to the positions held and hence are not entitled to be paid at the rate of time and one-half for service performed within the hours of their regular assignment on Saturday and Sunday. They were in service, duties or operations necessary to be performed seven days per week and their work weeks were staggered in accordance with the carrier's operational requirements.

For the reasons set forth above, we dissent.

J. A. Anderson
C. S. Cannon
R. P. Johnson
M. E. Somerlott
A. G. Walther